United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

261

No. 21,534

JOSEPH L. BYRD

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from the Judgment of Conviction of the United States District Court for the District of Columbia

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UNITED STATES COURT OF APPEALS FOR
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Appeal from the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the United States District Court for the District of Columbia, finding appellant guilty of a violation of D.C. Code 22-2201 (the Act of March 3, 1901, 31 Stat. 1324, ch. 854, as amended), which defines Grand Larceny. The court below had jurisdiction under D.C. Code 11-306. This Court has jurisdiction to hear the appeal under 28 U.S.C. 1291. The indictment appears at page of the record in this court; the verdict of the jury appears at page thereof; and the judgment of the court below appears at page . On November 30, 1967, appellant was granted leave by the District Court to proceed on appeal without prepayment of costs, and a transcript of the trial proceedings was

ordered at the cost of the United States. On December 28, 1967, the undersigned was appointed by this Court as counsel for appellant.

STATEMENT OF THE CASE

Appellant was convicted on August 22, 1967, of a violation of D.C. Code 22-2201, which defines Grand Larceny.

The events in this case occurred on December 17, 1966. On that day, Mrs. Ethel Harper, proprietor of a restaurant-bar in Washington, D.C. (Tr. 3), was in her restaurant that morning when appellant entered (Tr. 5, 94). Mrs. Harper testified that appellant asked to borrow $7.00 and she lent him $2.00 (Tr. 5); appellant testified that he knew all the girls wanted wigs and he told Mrs. Harper he knew a man who had some wigs, and he needed taxi fare to get them, whereupon she lent him "a couple dollars" and gave him a sandwich and some beers (Tr. 94).

Mrs. Harper was allowed to testify without objection that when appellant asked for the money, he said: "Mom, you know what I do, I got to have it. I rob, I steal, I kill, I got to have it. You know what I do", and Mrs. Harper continued: "and he was doing his arm like that" (at which point the witness apparently pointed to her arm in a manner which indicated the use of narcotics (Tr. 5-6). Here counsel for both sides approached the bench and the judge said: "Thepproblem is this - I didn't hear any objection". (Tr. 6). Counsel for the defendant replied that he had been distracted by the defendant and was not able to object in time, "but I object now and I have no recourse, Your Honor, but to move for a mistrial at this point, or in the alternative, you instruct the jury that should be disregarded". (Tr. 6-7). The

judge replied: "I will grant the second one. I will instruct the jury to disregard that part of it". (Tr. 7). In this connection, the United States Attorney admitted that "I knew it was coming and considered it. First of all, this is what the defendant actually told her and it goes to his motive for what happened later. He said to her, "I am a narcotics addict". Not in so many words, and "I need money, I have got to have money"". (Tr. 6)

Despite the trial judge's statement that he would instruct the jury to disregard Mrs. Harper's remarks, he later changed his mind and siad: "I think I will let it stay like it is..." (Tr. 8) Counsel for appellant then (again) formally moved for a mistrial or for an instruction to disregard the testimony, and the court denied the motion (Tr. 8), and the court did not give any such instruction to the jury (Tr. 140-155).

Mrs. Harper then testified that later in the afternoon of December 17, when the restaurant was "very crowded" (Tr. 9), appellant returned with three other men and attempted to sell her and other patrons some wigs. She said that two of the men "pretended they was fighting" (Tr. 10); "they really wasn't fighting, I don't think" (Tr. 20); "just making motions to get others attention" (Tr. 21). To each of these remarks, counsel for appellant objected, and in the first two instances, the court instructed the jury to disregard the remarks.

Mrs. Harper testified that she started to go to the scene of the fight when some of her employees shouted "Mom, he's got your pocketbook", and as she ran back she saw appellant throw her pocketbook to one of the men who came in with him, and the man ran out. (Tr. 11). In the pocketbook, she testified, was over $700.00 in cash, a watch, some keys,

and a birthstone. (Tr. 12-13). She said that she held on to appellant for a while, but he broke loose and ran away. (Tr. 13). He was arrested four days later. (Tr. 81-2, 98).

Mrs. Harper, on cross-examination, repeatedly denied that she knew appellant's name (Tr. 24, 25, 30, 34, 41, 42), although she admitted that she knew him and that he had patronized her restaurant over a considerable period of time (Tr. 24-25, 41-43). She denied that she had ever lent appellant money before (Tr. 26) or that he had ever worked for her (Tr. 43).

Two other witnesses testified that they saw appellant take Mrs. Harper's pocketbook. Eddie Kearse, who was working as the cook at the restaurant, testified that he saw appellant reach over the bar with an umbrella and hook the pocketbook, which fell off the umbrella, whereupon appellant reached over, picked up the pocketbook, and threw it to another man, who ran out of the restaurant. (Tr. 49-52, 56-57, 61-62). Joe Calvin Dawkins, a dishwasher in the restaurant, testified to the same effect. (Tr. 65-67). Although Eddie Kearse had testified in some detail that he grabbed the umbrella and struggled for it with appellant (Tr. 49, 57, 59-61) and was struck in the ear by the sharp point of the umbrella (Tr. 49, 52), Joe Calvin Dawkins (who said he saw the entire episode from beginning to end) did not mention any such struggle at all, though he expressly said he saw Mr. Kearse at the time of the fight (Tr. 74), nor did Mrs. Harper mention the struggle.

Appellant testified in his own defense. Although his attorney brought to the attention of the court the fact that appellant would take the

stand and had a record of numerous convictions (Tr. 89-90), and urged that to permit any use at all of any criminal record would be "inherently prejudicial" in this case (Tr. 90), the trial judge stated that "I am not going to tie the government's hands in this case..... This man has a pretty long history of trouble with the police department. He knows it. If he takes the stand you can tell him - or he hears me tell it now - he is going to be questioned about these petty larceny convictions". (Tr. 90-91). The trial judge went on to state that he would not limit the government to "just recent ones. I think they are entitled to know what this man's character is". (Tr. 91). He did exclude a 13-year old robbery conviction, but the government had already indicated it did not desire to use the robbery conviction (Tr. 89-90).

Appellant then took the stand. His attorney at once elicited from appellant that he had "been in difficulty with the law before" and had "served time in a jail or penitentiary as a result of difficulty prior to this" (Tr. 92). On cross-examination, the United States Attorney forced appellant to admit that he had been convicted of three petty larcenies within the three and a quarter years just prior to December 17, 1966 (convictions on September 9, 1963; November 5, 1964; and December 8, 1966). (Tr. 100-101). The trial judge gave a short admonition that prior criminal convictions went only to credibility as a witness, and was not evidence of guilt of the offense charged in this case (Tr. 101), and he repeated this verbatim in his instructions (Tr. 147).

Appellant in his testimony denied taking the pocketbook or having anything to do with the theft (Tr. 100). He said that the pocketbook had actually been taken by a man he knew as Charles, who had also been

in the restaurant in the morning at which time the two men exchanged a few words. He knew Charles somewhat, though not well. (Tr. 94-97). Nobody in the restaurant accused appellant of any wrongdoing at the time of the theft (Tr. 97), and Mrs. Harper asked him if he thought he could find Charles and recover the keys that were in the pocketbook (Tr. 97), but as the days went on people apparently began to think that, because appellant had been seen talking to Charles in the morning, he knew Charles and perhaps knew more about Charles than he was saying (Tr. 98, 127-8). Mrs. Harper apparently believed this, and resented the fact that appellant would not help her recover the pocketbook, and this led to her filing charges against him, charges which at first no one would back up (Tr. 99).

Appellant testified that he had known Mrs. Harper for some seven years (Tr. 93, 105), that he had worked for her husband (Tr. 93, 107, 8), that he had visited her restaurant quite frequently, and that she called him by name when he visited there. (Tr. 94). They were "close" (Tr. 98, 109). She knew his name perfectly well; she was a friend (Tr. 109). Mrs. Harper bought two wigs from him for $40.00 just before the fight started (Tr. 95-6, 120). He had no umbrella and saw none at any time (Tr. 100, 122-3). Mrs. Harper did not grab him (Tr. 127). Appellant seemed to be the only person in the restaurant who knew Charles (Tr. 127-8), which is what led to his troubles in this matter.

STATUTE INVOLVED

D.C. Code 14-305 (1967 Ed.)

> A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in

> evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters.....

STATEMENT OF POINTS

1. It was improper, prejudicial, and a violation of the "due process" clause of the Fifth Amendment to the Constitution, for the trial court to permit evidence of prior convictions of crime by appellant. If D. C. Code 14-305 is read as providing that such evidence may always be introduced, within the discretion of the trial judge, the statute is in conflict with the Fifth Amendment and is unconstitutional.

2. Appellant was deprived of the effective assistance of counsel in the trial court, in that his attorney (a) failed to object in time to the prejudicial remarks of the prosecuting witness that appellant told her, "You know what I do, I got to have it. I rob, I steal, I kill.....", and made the motions of being a narcotics addict, and (b) failed to call witnesses who might have testified that appellant did not take the pocketbook, and that Mrs. Harper knew him and his name very well.

3. It was error for the trial judge to refuse to either grant a mistrial, because of the remarks and actions of the prosecuting witness described above, or to instruct the jury to disregard those remarks and actions.

SUMMARY OF ARGUMENT

Any case in which the prosecution is permitted to impeach a defendant by evidence of prior convictions raises obvious questions under

Luck v. United States, 121 App. D.C. 151, 348 F.2d 763 (1965) and its progeny. That is the case here, in which the trial court ruled in advance that he would permit impeachment of appellant by evidence of any and all prior convictions, except a 13-year old robbery conviction which the government had already said it did not intend to use. Faced with this advance ruling, counsel for appellant had little choice, if appellant were to testify, but to have appellant admit that he had served time in jail. The prosecutor then made appellant admit to three convictions, all within just a few years, for petty larceny. Necessarily this prejudiced appellant in the eyes of a jury hearing a prosecution for Grand Larceny.

We believe the trial judge abused his discretion within the Luck framework. If, however, Luck and its progeny are thought to authorize the court's ruling below, we believe this was a violation of appellant's right to "due process of law" under the Fifth Amendment. If the underlying statute, D.C. Code 14-305 (1967 Ed.), authorizes such evidence, that statute must be held to be unconstitutional.

A further highly prejudicial action occurred when Mrs. Ethel Harper, the prosecuting witness, was allowed to testify that appellant told her, when he asked to borrow some money, that "You know what I do, I got to have it. I rob, I steal, I kill, I got to have it. You know what I do". She apparently accompanied these words with actions indicating that appellant was showing her that he was a narcotics addict. Appellant was deprived of the effective assistance of counsel when his attorney failed to object to these remarks (being, he said, distracted by defendant). In any event, the court erred in refusing to grant a mistrial or to instruct the jury to disregard this testimony.

Appellant also says that he was deprived of the effective assistance of counsel when his trial attorney failed to call witnesses who, according to appellant, could have testified that he did not take the pocketbook and that Mrs. Harper was not telling the truth when she repeatedly testified that she did not know appellant well and did not know his name.

ARGUMENT

1. Permitting evidence of prior convictions was error and a violation of "due process".

This case raises the question of the status in the law of the rule laid down in Luck v. United States, 121 App. D.C. 151, 348 F. 2d 763 (1965), that evidence of prior convictions of crime may be admitted, in the discretion of the trial court. The Luck ruling was an interpretation of a statute, D.C. Code 14-305 (1961 Ed.) which is essentially the same in its recodified form (1967 Ed.) as it was in the version before the Court in Luck. The statute read as follows at the time of the trial of this case:

> "A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters....."

In the Luck case, the Court majority held that section 14-305 is not written in mandatory terms; it does not provide that evidence of prior conviction "shall" always be admitted, but only that such evidence "may" be admitted in the sound discretion of the trial judge, depending upon the possibly prejudicial effect of the impeaching evidence.

In the case at bar, appellant's counsel properly raised the issue in advance by a bench colloquy in which he informed the court that appellant proposed to take the stand. (Tr. 88). He stated that appellant had an old robbery conviction 13 years earlier, and had "between ten and twelve misdemeanors, which he served time on. The bulk are petty larcenies". (Tr. 89). The judge inquired about the age of the convictions and indicated he would not permit anything but fairly recent ones, but counsel for the appellant stated that under the Luck line of cases "it is my opinion in this type of case, recent misdemeanor record would be inherently prejudicial". (Tr. 90). The following colloquy with appellant's counsel then ensued (Tr. 90-91):

> "THE COURT: It is true he has got a number of arrests but I am not going to tie the government's hands in this case. I think they are entitled to ask him about these petty larceny convictions, ... This man has a pretty long history of trouble with the police department. He knows it. If he takes the stand you can tell him - or he hears me tell it now - he is going to be questioned about these petty larceny convictions.
>
> MR. DYSON: You mean all petty larceny convictions or only recent ones?
>
> THE COURT: I am not going to limit the government to just recent ones. I think they are entitled to know what this man's character is.
>
> MR. DYSON: But not as to the felony?
>
> THE COURT: That is right."

Is it any wonder, then, that in an attempt to defuse the evidence he knew was coming, appellant then took the stand and under questioning from his own attorney admitted that he "had been in difficulty with the law before", and had "served time in a jail or penitentiary as a result of difficulty prior to this"? (Tr. 92). Obviously this was not

voluntary testimony; it was made under compulsion of the evidence the court had said he would permit. Of the recent holding of the Supreme Court in Simmons v. United States, decided March 18, 1968, 36 LW 4227, in which the admission of one Garrett that he was the owner of certain property, made as a necessary basis for his unsuccessful motion to suppress that property as evidence, was improperly admitted as evidence in his trial. The Court said, in response to the suggestion that Garrett's admission was "voluntary":

> "However, the reasoning which underlies this reasoning is that the defendant has a choice; he may refuse to testify and give up the 'benefit'. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created." 36 LW 4232.

The Court held that it was "intolerable that one constitutional right should have to be surrendered in order to assert another", and ruled that the admission of Garrett's testimony over his objection was reversible error. We think this reasoning is pertinent to the case at bar.

On cross-examination the prosecuting attorney, not content with appellant's admission of prior "difficulty with the law" and having "served time in a jail or penitentiary", forced appellant to admit to three recent convictions for petty larceny - on November 5, 1964; September 9, 1963; and December 8, 1966 (Tr. 100-101). Immediately following the recital of this last date, the prosecutor said (Tr. 101): "Now, this incident that we talked about occurred on December 18 of 1966." Obviously the prosecutor was attempting to create the impression that appellant went from one petty larceny to another, the case at bar being simply another in the chain, and the prosecutor succeeded. We think he went too far.

The entire framework of the Luck opinion is that the trial judge must carefully weigh "the prejudicial effect of impeachment" against the "probative relevance of the prior conviction to the issue of credibility" (Tr. 768). In subsequent cases, this Court has refined and sharpened the Luck rule and has delineated the nature of the problem to which the judge must apply his reasoned discretion. A significant step was taken in Gordon v. U.S., -- U.S. App. D.C. -- , 383 F.2d 936 (1967), in which this Court said:

> "A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before the probably did it this time'. As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity". (Emphasis added).

That is precisely what the trial judge did not do in the instant case. Far from limiting the number of petty larceny convictions that could be shown in this Grand Larceny case, the judge said: "I am not going to tie the government's hands in this case." (Tr. 90). When defense counsel asked if this meant "all petty larceny convictions or just recent ones", the judge replied: "I am not going to limit the government to just recent ones. I think they are entitled to know what this man's character is". (Tr. 91) (Emphasis added) The idea of showing the jury "what this man's character is", obviously for the purpose of coloring the jury's opinion of appellant, is a highly prejudicial concept, contrary to the Luck and Gordon mandates, and was an abuse of discretion. Compare the "meaningful discretion" approved

by this Court in Payne v. U.S., No. 21, 232, decided March 5, 1968, in which the trial judge, by allowing only one conviction to be shown as to one defendant (two as to another) "provided some impeachment but did not unloose a barrage of convictions that could have condemned defendant out of hand as an irremediably hardened criminal". And see Barber v. U.S., No. 21,281, decided on March 8, 1968, in which this Court (speaking of "inflammatory irrelevancies") reversed because the judge exercised no discretion under the Luck rule, the Court saying:

> "Once appellant's prior record was disclosed to the jury, on the facts of this case, it is impossible to say with assurance that the jury would have found appellant guilty beyond a reasonable doubt of the crime for which he was on trial."

If this Court does not believe that what happened in this case was an abuse of discretion under Luck, then we urge that the admission (of prior convictions) forced out of appellant and the evidence of prior convictions violated his right to "due process of law" under the Fifth Amendment to the Constitution. And if it is thought that the statute, D.C. Code 14-305, is a Congressional mandate that some such impeaching evidence is always admissible, we say that the statute itself is unconstitutional as a violation of "due process".

This constitutional argument has been touched on at least once by this Court. In Trimble v. U.S., 125 U.S. App. D.C. 173, 369 F.2d 950 (1966), appellant contended (for the first time) that section 14-305 is unconstitutional. The Court pointed out that in the trial court the objection to the impeaching evidence was made with no suggestion of a constitutional basis, and then said that "we decline in our discretion to consider the constitutionality of the Code provision, now questioned for the first time . .

on appeal". (125 App. D.C. at 175).

In all candor, we must say to the Court that in the case at bar likewise, the constitutional issue was not raised below, but since (as is said in Trimble) this is a matter which is within the Court's discretion, we ask that the Court exercise its discretion in favor of hearing the argument on constitutionality. If so, we think the statute can be shown to violate the "due process" clause of the Fifth Amendment, at least as applied in this case.

2. Appellant was deprived of the effective assistance of counsel.

(a) Appellant was deprived of the effective assistance of counsel when his trial attorney failed to object when the prosecuting witness, Mrs. Harper, having testified that appellant had asked to borrow $7.00 from her on the morning of December 17, 1966, was asked what appellant said and she replied (Tr. 5):

> "He said he had to have the money. He said, 'Mom, you know what I do, I got to have it. I rob, I steal, I kill, I got to have it. You know what I do,' and he was doing his arm like that."

The witness at this point was showing by her motions that appellant had indicated he was a narcotics addict.

Apparently appellant's counsel made some motion or noise at this point, because the trial judge said (Tr. 5): "Suppose you approach the Bench". The following colloquy then occurred (Tr. 6-7); Mr. Dyson was attorney for the appellant and Mr. Ellenhorn was the prosecutor:

"THE COURT: The problem is this -- I didn't hear any objection.

MR. DYSON: My attention was to the defendant.

THE COURT: You knew it was coming?

MR. ELLENHORN: I did know it was coming. I think it is proper.

MR. DYSON: I think it should be stricken.

THE COURT: She is relating a conversation she had with him.

MR. ELLENHORN: Your Honor, may I say this, and I certainly considered this: I knew it was coming and considered it. First of all, this is what the defendant actually told her and it goes to his motive for what happened later. He said to her, 'I am a narcotics addict'. Not in so many words, and 'I need money, I have got to have money'."

THE COURT: She didn't say anything about narcotics.

MR. ELLENHORN: No, she began at that point when Your Honor interrupted, pointed to her arm.

. . . . . .

MR. DYSON: Your Honor, I understand even if you agree with Mr. Ellenhorn you have it within your discretion that something inherently prejudicial you may exclude.

THE COURT: She has already said it now and the jury heard it.

MR. DYSON: I know, there is nothing I can do about it, I didn't move as the defendant had my attention and I didn't object, but I object now and I have no recourse, Your Honor, but to move for a mistrial at this point, or in the alternative, you instruct the jury that should be disregarded."

Although the judge at first said he would "grant the second one" (the instruction), he then changed his mind and denied the motion in its entirety (Tr. 8). Thus the record stands that trial counsel failed to object in time to this very damaging testimony, and the jury heard it and was not even instructed to disregard it.

It appears that defense counsel was distracted by appellant, who was attempting to tell counsel something, and Mrs. Harper's testimony

was given before counsel realized what was happening. This does not cure the situation for appellant, however; he is still injured.

(b) Appellant also contends that trial counsel failed to seek out and call witnesses who might have testified to either or both of the following - that he did not take the pocketbook; that Mrs. Harper (contrary to her testimony) knew appellant well and knew his name perfectly well. If this is true, it might amount to the deprivation of the effective assistance of counsel. Our Motion for Release on Personal Recognizance, etc., filed on February 23, 1968, raised this point.

The law on the assistance to be rendered by counsel seems clear. The Sixth Amendment to the Constitution guarantees an accused the "assistance of counsel for his defense", and the Supreme Court in 1932 laid down the rule that this means the "effective assistance of counsel". Powell v. Alabama, 287 U.S. 45 (1932). It has been held by this Court that the "due process" clause of the Fifth Amendment also incorporates that concept. Neufield v. U.S., 73 App. D.C. 174, 118 F.2d 375 (1941), cert. den. 315 U.S. 798.

It is true that this Court has held repeatedly that accused persons are not guaranteed counsel who do not make mistakes, e.g., Moore v. U.S., 95 App. D.C. 92, 220 F.2d 198 (1955); that mere improvident strategy, poor tactics, carelessness or inexperience do not necessarily amount to ineffective assistance unless taken as a whole the trial was a mockery of justice, Edwards v. U.S. 103 App. D.C. 152, 256 F. 2d 707 (1958), cert. den. 358 U.S. 847; and that the phrase does not mean the "successful assistance of counsel", Mitchell v. U.S., 104 App.

D.C. 57, 259 F. 2d 787 (1958), cent, den. 358 U.S. 850. We think, however, that the controlling decision here ought to be Jones v. Huff, 80 App. D.C. 254, 152 F. 2d 14 (1954), in which this Court held that it would amount to "ineffective assistance" if (as alleged) defense counsel failed to object to a coerced confession, failed to subpoena known witnesses for the defense, failed to call a handwriting expert on a charge of forgery, and failed to offer a sample of handwriting even though a juror requested it.

3. Mrs. Harper's testimony was prejudicial and prevented appellant from receiving a fair trial.

The testimony of Mrs. Harper quoted above, "You know what I do....I rob, I steal, I kill, I got to have it," accompanied by her motions indicating that appellant was telling her he was a narcotics addict, was highly prejudicial and adversely affected the jury's impression of appellant. Here is a man on trial for Grand Larceny, and the jury is being told that he says he robs, he steals, he kills; and he is further affected by being labeled a narcotics addict. After that, no fair trial could have taken place; the jury would doubtless believe anything about him.

Even without objection from defense counsel, the trial court should have controlled this matter and, if taken by surprise, should have attempted to repair or undo the damage. But when defense counsel moved for either a mistrial or an instruction that the jury disregard Mrs. Harper's remarks (Tr. 7), the judge (after first saying, (Tr. 7) he would instruct the jury to disregard) changed his mind and said (Tr. 8): "I think I will let it stay like it is,....". Defense counsel then said (Tr.8): "So the record is absolutely clear, I move for a mistrial, or alternatively that you instruct the jury they disregard", to which the court replied: "I'll deny it,

let's proceed".

Mrs. Harper's remarks and actions were unnecessary to the trial of the charge here, were prejudicial to appellant, and constitute another ground for reversal.

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,534

JOSEPH L. BYRD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROGER E. ZUCKERMAN,
Assistant United States Attorneys.

Cr. 169-67

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Where appellant, charged with grand larceny, took the stand and was impeached as to credibility with three prior petit larceny convictions in 1963, 1964 and 1966, did the trial court abuse its discretion in allowing such impeachment?

2. Were appellant's *res gestae* declarations that he needed to borrow money to support his narcotics habit, probative of his motive for the larceny some six hours later, properly admitted into evidence?

3. Was appellant denied effective assistance of counsel?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,534

JOSEPH L. BYRD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed February 23, 1967, appellant was charged with assault and grand larceny in violation of 22 D.C. Code §§ 501 and 2201. After a trial before United States District Court Judge John J. Sirica and a jury on August 21 and 22, 1967, appellant was found guilty of grand larceny. On October 20, 1967, appellant was sentenced to a term of imprisonment from forty months to ten years. This appeal followed.

The Government's Case

The Government's case rested on the testimony of three eyewitnesses, each of whom testified that appellant took

and threw to a fleeing companion the handbag of the complainant, Ethel Harper. Mrs. Harper, proprietor of the Ohio Restaurant at 1380 H Street, N.E., opened the Government's case. She testified that she had seen appellant in her restaurant on several occasions prior to the day in question, December 17, 1966, knowing him by face but not name. On that day, appellant first entered her restaurant at approximately 11:00 a.m. He desperately pleaded with Mrs. Harper to loan him $7.00. Mrs. Harper indicated that appellant gave as his reason for the urgent need of funds his narcotics habit. (Tr. 6-7) This testimony precipitated a lengthy bench conference at which trial counsel unsuccessfully moved for a mistrial or alternatively to have the testimony stricken (Tr. 7-8). Mrs. Harper then testified that she acceded to appellant's request and lent him two dollars (Tr. 8). Appellant then left the restaurant.

He returned at 4:00 p.m. that afternoon accompanied by three companions. The restaurant was at this time crowded and Mrs. Harper was eating. (Tr. 8-10). Appellant carried a bag containing wigs which he tried to sell to the patrons. Mrs. Harper declined to make any purchase of these items from appellant. (Tr. 9). Momentarily distracted by two individuals pretending to fight "just making motions to get the others attention" and by appellant's outcry to her that "you better stop that fight . . . they are going to tear up the restaurant", Mrs. Harper then heard a sugar dish from behind the bar crash to the floor (Tr. 10, 21, 29). Everybody in the restaurant was shouting, "Mom [Mrs. Harper's nickname] he's got your pocketbook" (Tr. 11). She looked over and saw appellant in possession of her black pocketbook which she customarily left behind the bar, employees only having access to that area (Tr. 11-12). At that time, the pocketbook contained some $700 in cash, a valuable wrist watch and ring as well as other personal items. Appellant threw the pocketbook to one of his companions who ran from the restaurant. (Tr. 10-12, 32). Mrs. Harper then grabbed appellant. Appellant, while in her grasp, stated that he

no longer had the pocketbook but if she freed him, he would attempt to retrieve it. (Tr. 14, 17) He then broke free and ran from the restaurant. Mrs. Harper called the police who arrived moments later. (Tr. 15-16, 18)

Some days after the incident, a patron informed Mrs. Harper that appellant was in a restaurant just down the block. She went there and recognized him. Then she telephoned the police who arrived and arrested appellant moments later. (Tr. 21-22) As appellant was being driven to the stationhouse, he called to Mrs. Harper from the scout car that if she didn't press charges, "he would replace all the money" (Tr. 15).

Eddie Kearse then testified. On the day in question, he was employed by Mrs. Harper as a cook and cashier. During the late afternoon, he was stationed at the cash register which rested on the bar at the front of the restaurant. After someone hollored "Why don't you stop that fight," he noticed two men feigning a fight in the area between the cash register and the front door. (Tr. 46-47) Kearse started around the end of the counter to break up the fight. He heard the sugar jar on the wall behind the bar crash and looked back to see appellant, who was sitting on a stool at the bar, reach over the bar with an umbrella. (Tr. 47-48, 57) He grabbed the umbrella to take it from appellant and in the ensuing struggle, the pointed end of the umbrella struck Kearse in the ear lobe. Finally getting the umbrella from appellant, Kearse saw appellant reach behind the bar to a shelf and grab Mrs. Harper's pocketbook.[1] (Tr. 49-50, 57) Appellant then tossed the pocketbook to "another fellow" who ran out (Tr. 51). Patrons of the restaurant unsuccessfully tried to apprehend him. The two individuals who feigned the fight also ran out. (Tr. 52-53) Mr. Kearse corroborated Mrs. Harper's description of the events leading to appellant's arrest some days later (Tr. 53).

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[1] Appellant pulled the pocketbook along a shelf behind the bar with the crook end of the umbrella until it was close enough to grab. In so doing, he caused the sugar jar to crash. (Tr. 50)

Joe Calvin Dawkins, a dishwasher at the Ohio Restaurant, testified. He stated that as he was bringing dishes from the kitchen, he saw appellant lean over the bar counter and come up in possession of Mrs. Harper's pocketbook. Appellant then tossed it to another who ran from the restaurant with it. (Tr. 64-66) Dawkins corroborated Mrs. Harper's testimony that appellant earlier in the day attempted to borrow money (Tr. 67). As the other two witnesses, Dawkins identified appellant with certainty (Tr. 68).

Officer David L. McGonegal testified that he responded to the restaurant at 4:27 p.m. on the day in question after having received a radio run in his scout car concerning the theft (Tr. 76-77). Officer Samuel D. Renner testified concerning the events surrounding appellant's arrest four days later on December 21, 1966. Having received a radio run, he proceeded to the Ohio Restaurant where he was met by Mrs. Harper. She proceeded down the block to Speed's Restaurant and identified appellant as the individual who stole her purse. (Tr. 81-83) Appellant was then arrested.

Appellant's motion of judgment of acquittal on the assault count (count 2) was granted. His motion for judgment of acquittal on the grand larceny count was denied. (Tr. 88) A *Luck* hearing was then held at the bench. Over trial counsel's objection, the court ruled admissible for impeachment purposes prior petit larceny convictions. The Government did ask to not use a robbery conviction some thirteen years old. (Tr. 90-91)

The Case for the Defense

Appellant took the stand to testify. During the course of that testimony, the following defense was presented. Appellant had not held a job since 1961. He supported himself largely by gambling or by selling stolen property. (Tr. 103-4, 117). On the day in question, appellant was so engaged, attempting to sell to Mrs. Harper and the patron's of her restaurant some twenty-four wigs which he had good reason to believe were stolen.

(Tr. 98, 99, 111-13, 119) He borrowed money the morning of the 17th from Mrs. Harper as cab fare to procure the wigs, the Christmas season approaching and the demand increasing (Tr. 94-95). Appellant and his companions arrived back at the Ohio Restaurant late in the afternoon with the twenty-four wigs. He sold two to Mrs. Harper who had just finished paying him when a fight broke out. (Tr. 95-96). Appellant was aware that Mrs. Harper kept large amounts of money in her purse. After the fight, which he and Mrs. Harper broke up, the bouncer chased a companion named "Charles" from the restaurant. When he returned, it was discovered that Mrs. Harper's purse was missing. Appellant agreed to try to find this individual and return Mrs. Harper keys. He denied running from the restaurant claiming to have left ten or fifteen minutes later after the bouncer returned. (Tr. 95-97)

Appellant claimed that several days later Mrs. Harper accused him of refusing to divulge the name of the individual called "Charles" who allegedly stole the purse. Then, as an apparent vendetta, Mrs. Harper filed charges against appellant and coerced others into supporting them. (Tr. 98-99) During cross-examination, in conjunction with an instruction then delivered by the trial court that any prior convictions are relevant only to credibility, appellant admitted three prior convictions for petit larceny in 1963, 1964 and 1966.

The Government's Rebuttal

Parks McRee, bouncer at the Ohio Restaurant for the previous eight years, testified. Contrary to appellant's claims (Tr. 107), McRee stated that to his knowledge he never knew appellant to work for Mrs. Harper nor did he know Mrs. Harper to run neighborhood crap games. (Tr. 132-33) Moreover, McRee testified that upon his return to the restaurant following a brief chase of the individual to whom the pocketbook had been tossed, he did not see appellant there (Tr. 134-35).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2201, provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

I

The trial court properly exercised its discretion in allowing impeachment of appellant with prior petit larceny convictions. Of recent vintage and reflecting adversely on appellant's truth telling propensity, the three petit larceny convictions used by the Government for impeachment purposes were decidedly probative of appellant's credibility. Prejudice suffered by appellant was minimal. The older and more remote of appellant's twenty-odd convictions during the last decade were not used. Limiting itself to but three petit larceny convictions during the previous three years, the Government also avoided any possible cumulative effect which revelation of a larger portion of his record might have had. In no sense was a barrage of convictions released. Concurrent with the introduction of the evidence, the trial court explicitly admonished the jury to limit consideration of appellant's convictions solely to the issue of credibility. That the three petit larceny convictions are of a similar character to the offense at trial, grand larceny, is insufficient basis on which to predicate discretionary abuse.

Appellant's contention that his tactical attempt on direct examination to blunt possible impeachment by testifying generally that he had spent time in jail amounted to coerced and involuntary testimony is meritless. Moreover, not having raised any constitutional challenge below, he is plainly foreclosed on appeal from raising for

the first time such an attack on the statute allowing impeachment by prior conviction.

II

The complainant's testimony relating statements by appellant on the morning of the day in question in which he admitted the use of narcotics and pleaded to borrow funds to support his habit was properly admitted below. It is long settled in this jurisdiction and elsewhere that evidence probative of the motive for the charged offense is not to be stricken on the basis that it happens to relate another criminal offense. Moreover, proximate to the offense in time and distance and causally related to its commission, appellant's declarations to the complainant some six hours before he stole her purse were clear *res gestae* admissions.

III

Appellant has no ineffective assistance of counsel claim. His contention that trial counsel failed to make timely objection to the complainant's testimony about his *res gestae* admissions is meritless: first, because trial counsel in fact moved to strike the testimony or for a mistrial at the bench immediately thereafter; second, because trial counsel could in no way be expected to anticipate the answer given by the complainant to the Government's mildly innocuous question; third, because even if it were anticipated and an objection lodged prior to it the trial court plainly indicated its view that the testimony was proper and hence would have allowed it in any event; and fourth, because indeed the evidence of appellant's *res gestae* admission was quite properly admitted.

As to appellant's claim that trial counsel failed to call certain witnesses who might have supported appellant's story, this claim raises material wholly *dehors* the record and should be given no consideration. Moreover, trial counsel is not to be faulted for the failure of appellant's cohorts in the stolen wig business to support his

alibi. Plainly, on the record below appellant received effective vigorous representation.

ARGUMENT

I. The trial court properly exercised its discretion in permitting impeachment of appellant with prior petit larceny convictions.

(Tr. 89-91, 100-101)

The rule of *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) affords an accused who has been previously convicted and who desires to testify an opportunity to invoke the trial court's discretion successsively to bar impeachment by prior convictions (1) if the prejudice from the prior convictions far outweighs their probative relevance to credibility, and (2) even if the prejudice does not far outweigh the relevance to credibility, if it is more important for the jury to have an accused's version of the events in question than to have him remain silent out of fear of impeachment. *Gordon* v. *United States*, —— U.S. App. D.C. ——, 383 F.2d 940-941 n.11 (1967).

To the extent that there was here a meaningful invocation,[2] we think the trial court's ruling allowing the Government to impeach appellant with several recent petit larceny convictions was not an abuse of its discretion, particularly in view of the length and nature of the prior criminal record of appellant.[3] Certainly, appellant has

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[2] Trial counsel did urge that the convictions were "inherently prejudicial" (Tr. 90). Nowhere, however, did he direct himself to the relevant inquiry, namely, whether the probative value of the petit larcenies outweighed their prejudicial effect. In this circumstance, we think his invocation of the trial court's discretion was decidedly incomplete. *Lewis* v. *United States*, D.C. Cir. No. 21,083, decided February 13, 1968. *Hood* v. *United States*, 125 U.S. App. D.C. 16, 18, 365 F.2d 949, 951 (1966).

[3] Since 1959 alone, appellant was arrested over 30 times with at least 20 convictions. Eight of these convictions were petit larcenies, occurring in 1959, 1960, 1961, 1963, 1964 and 1966. The trial court was apparently willing to allow the Government to impeach

not urged any substantial reason for this Court to give the trial court's exercise of discretion other than "a respect appropriately reflective of the inescapable remoteness of appellate review." *Luck* v. *United States*, *supra* at 157, 348 F.2d at 749.

The trial court during the *Luck* hearing had before it a record in which appellant had one felony conviction, a robbery offense some thirteen years old, and at least "ten or twelve" misdemeanor convictions, the bulk of which were petit larcenies (Tr. 89). The trial court allowed the Government the use of prior petit larceny convictions for impeachment. The Government to this end used the three most recent petit larceny convictions, September 9, 1963, November 5, 1964, and December 17, 1966. (Tr. 100-101.) We think this decision was decidedly correct and reflected a prudent accommodation of the probative value of the convictions and their possible prejudice. Petit larceny is plainly an offense probative on the issue of credibility. "In common human experience acts of deceit, fraud, cheating, stealing for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity." *Gordon* v. *United States*, *supra*, 383 F.2d at 940. The three petit larceny convictions were of recent vintage, within the previous three years. In view of the fact that appellant's testimony flew directly in the face of the events as outlined by the Government's witnesses and that a battle of credibility ensued, it was of decided import that evidence plainly probative of appellant's veracity and truth-telling propensity be given the jury.[4]

Moreover, any prejudice suffered by appellant was minimal. The trial court did not allow use of the thirteen year old robbery conviction or non-probative misdemean-

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appellant with all the petit larceny convictions. The Government, however, used only the three most recent.

[4] To have permitted appellant to testify immune from impeachment might have artificially weighted the balance on the evidentiary scale in his direction. See *Brooke* v. *United States*, —— U.S. App. D.C. ——, 385 F.2d 279, 285 (1967).

ors, nor did the Government use any other of the older petit larcenies. The Government by limiting itself to but three recent convictions, was further careful to avoid any possible cumulative effect which the revelation of appellant's entire record might have had on the jury. In no sense was a "barrage of convictions" released. *Payne* v. *United States*, D.C. Cir. No. 21,232, decided March 5, 1968. Finally, in order to make unequivocally clear to the jury the purpose for which the evidence of three prior convictions was adduced, the trial court concurrent with their introduction explicitly admonished the jury that any prior convictions were "admitted into evidence solely for your consideration in evaluating the credibility of the defendant as a witness. It is not evidence of the defendant's guilt of the offense with which he is charged. You must not draw the inference of guilt against the defendant from his prior conviction or convictions. You may consider it only in connection with your evaluation of the credence to be given his present testimony in court" (Tr. 100-101).[5] Surely this makes unlikely appellant's present contention that the prosecutor "succeeded" in creating "the impression that appellant sent from one petty larceny to another, the case at bar simply another in the chain" (App. Br. 11). We think the trial court's instruction further limited any possible prejudice to appellant stemming from the fact that the three petit larceny convictions were of substantially the same character as the grand larceny offense with which he was charged. In any event, we think the law is plain that such similarity is insufficient grounds on which to predicate a claim of discretionary abuse. *Lewis* v. *United States*, D.C. Cir. No. 21,083, decided February 13, 1968 (where the de-

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[5] The court below gave this instruction directly after the prosecutor questioned appellant about the first petit larceny conviction, interrupting the prosecutor's line of questions to do so (Tr. 100). Thus the instruction preceded revelation of appellant's other two petit larceny convictions. We think it plain from the record below that the trial court would have preferred if the instruction preceded the first petit larceny conviction also (Tr. 100).

fendant, accused of robbery and assault with a dangerous weapon, was impeached with six robbery convictions and one assault with intent to commit robbery conviction).

As in *Lewis*, appellant here took the stand and presented "a singularly unimpressive defense." [6] Appellant, attempting tactically to defuse the impeachment by prior petit larcenies that he expected on cross-examination, testified on direct examination that he "had been in difficulty with the law before" and had "served time in a jail or penitentiary as a result of" this difficulty. Appellant now attempts to claim this tactical decision to have been coerced testimony of a non-voluntary nature. This is surely absurd. Appellant's reliance on the recent decision in *Simmons* v. *United States*, decided March 18, 1968, 36 Law Week 4227 (holding *inter alia* that testimony of ownership by an accused at a motion to suppress hearing is inadmissible over objection at trial) is patently inapposite. Attempting to defuse the effect of otherwise properly admissible evidence in no sense placed appellant in the constitutional dilemma of the accused in *Simmons* but rather left him with choices of a purely tactical dimension. See, *e.g.*, *Troublefield* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 912 (1966).[7]

As to appellant's contention that the trial court allowed in the petit larceny convictions to show appellant's "character" (Tr. 91), we think it plain that the trial court meant appellant's propensity for truth-telling, or, as it previously indicated, "moral turpitude" (Tr. 90). Surely the considered instruction given by the court to the

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[6] Thus, faced with three eyewitness identifications of him as the individual who snatched the complainant's purse from the bar counter, appellant's defense rested partly on acceptance of his contention that the complaining witness had coerced her employees into testifying in court against him.

[7] In *Troublefield*, defense counsel tactically waived a limiting instruction to which he was entitled. His decision was based on an attempt to lessen the effect of certain prosecution evidence. On appeal, appellant, claiming failure of the court to give the instruction to have been plain error, was held to his tactical waiver.

jury, some moments later, indicated this to have been the rationale of its decision (Tr. 100-101).

Having failed to ventilate the issue below, appellant is plainly barred from here for the first time raising his claim that 14 D.C. Code § 305, the statutory provision under which his impeachment by prior conviction occurred, is unconstitutional. *Trimble* v. *United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966). Appellant, recognizing the decision in *Trimble*, has demonstrated nothing to remove himself from the ambit of its holding. Moreover, outside of the conclusory allegation that it violates "due process" (App. Br. at 13, 14) he has presented no reasoning in support of his claim. In these circumstances and in view of what we submit to be a manifestly proper discretionary exercise by the court below absent any constitutional claim, we think appellant is foreclosed from here broaching it for the first time.

II. The complainant's testimony concerning appellant's need for funds to purchase narcotics was probative of the motive for the subsequent larceny and properly admitted into evidence.

(Tr. 6, 95, 98, 99, 103, 104, 111-13, 117, 119).

Appellant objects to the testimony of the complainant, Mrs. Harper, by which she related his attempt on the morning of the offense to borrow seven dollars from her to purchase narcotics:

> "He said he had to have the money. He said, 'Mom [her nickname], you know what I do, I got to have it. I rob, I steal, I kill, I got to have it. You know what I do', and he was doing his arm like that". (Tr. 6)[8]

Decidedly probative of appellant's motive for the larceny, proximate in time and distance to the offense some six hours later and a part of the *res gestae*, the trial court

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[8] Apparently the witness pointed to her arm to indicate appellant's manner of showing his narcotic addiction to her (Tr. 6).

below was eminently correct in allowing the complainant's testimony to remain in evidence.

It is a principle of long standing that evidence probative of the motive for the charged offense is not to be stricken on the basis that it happens to relate to another criminal offense. *Drew* v. *United States*, 118 U.S. App. D.C. 11, 15, 331 F.2d 85, 89 (1964). See also, *Boyer* v. *United States*, 76 U.S. App. D.C. 397, 132 F.2d 12 (1942); *Witters* v. *United States*, 70 U.S. App. D.C. 316, 106 F.2d 837 (1939); *Fall* v. *United States*, 60 App D.C. 124, 49 F.2d 506 (1933); *Partridge* v. *United States*, 39 App. D.C. 571, 576 (1913). And see *United States* v. *Klein*, 340 F.2d 547 (2d Cir. 1965); *United States* v. *Robbins*, 340 F.2d 684 (2d Cir. 1965); *United States* v. *Rosenblum*, 339 F.2d 473 (2d Cir. 1964). Numerous text writers have reaffirmed this rule. See *e.g.* 1 Wigmore §§ 215-217. (3rd ed. 1940). In the present case appellant's admission of narcotics addiction on the morning of the offense and his plea to the complaining witness for money to support it was decidedly probative of his motive for the larceny of Mrs. Harper's purse later that afternoon. It plainly indicated the lengths to which appellant was willing to go to procure funds to support his habit. As such, we think it was quite properly admitted into evidence.

Moreover, the evidence of appellant's declarations to Mrs. Harper is plainly a part of the *res gestae* of the offense. Made by him to the prospective victim in the restaurant in which he stole her purse some six hours later, his statements were proximate to the offense in time and distance and constituted clear *res gestae* admissions. *Rogers* v. *United States*, 334 F.2d 83 (5th Cir. 1964), *cert denied*, 380 U.S. 915. For this reason also, we think appellant's declarations were properly admitted below.

Although now conclusorily averring manifest prejudice to have accrued, appellant is unable in concrete terms to specify any unfairness. Indeed, we think the record indicates that no such prejudice occurred. At trial during

the presentation of his own case, appellant admitted that during the prior six years he had supported himself largely by gambling or by selling stolen property (Tr. 103, 104, 117). His defense rested on the assertion that he was present in the restaurant on the afternoon of the theft in order to sell stolen property (wigs) to the patrons (Tr. 94, 95, 98, 99, 111, 112, 113, 119). His stated reason at trial for borrowing the money from Mrs. Harper on the morning of the offense was the need of cab fare to procure that stolen property (Tr. 111, 112, 113). Having framed his defense on the basis of clear criminality, we think appellant can now hardly be heard to claim that reversible prejudice accrued from his *res gestae* admissions to the same effect and directly probative of his motive for the subsequent larceny.

III. Appellant was not denied effective assistance of counsel.

(Tr. 5, 7, 8)

Appellant claims ineffective assistance by trial counsel. We think this contention is frivilous. The burden on appellant to establish such a claim is heavy. He must show his representation to have been "so ineffective that [a]ppellant was denied a fair trial". *Harried* v. *United States*, D.C. Cir. No. 20,327, decided November 30, 1967 (slip op. at 6). See *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 63, 259 F.2d 787, 793, *cert. denied*, 358 U.S. 850 (1958). Plainly, he has not done so.

Appellant bases his claim on the contention that "the trial counsel failed to object in time" to Mrs. Harper's testimony concerning appellant's *res gestae* statements about his need for funds. The record is clear, however, that several times at the bench conference directly after the statement counsel moved to strike the evidence or alternatively for a mistrial (Tr. 7-8). At the close of the bench conference, trial counsel stated, "So the record is absolutely clear, I move for a mistrial or alternatively that you instruct the jury they disregard [the testimony]"

(Tr. 8). We are at loss to understand what further appellant would now urge trial counsel to have done. Surely, trial counsel would have to have been clairvoyant to anticipate the answer given by Mrs. Harper from the Government's mildly innocuous question, "Can you tell us what the defendant said when he asked you for this money, if you can remember" (Tr. 5) and to interpose his objection prior to that answer. Moreover, as the ensuing bench conference made clear, such objection would have been to no avail since the testimony was properly admissible in the view of the trial court. Finally, as we have argued (*supra*, 12-14), the evidence of appellant's *res gestae* admission of motive was in any event properly admissible.

As to appellant's present contention that trial counsel failed to "seek out and call witnesses" who might have testified in appellant's behalf, this claim raises material wholly *dehors* the record and should be given no consideration. Especially is this the case in view of the strength of the Government's case below, a factor properly to be considered in evaluating ineffective assistance of counsel claims. *Mitchell* v. *United States*, *supra*. The Government relied on the testimony of three eyewitnesses, all of whom were substantially consistent in their testimony that appellant grabbed Mrs. Harper's purse from the back of the bar and threw it to a companion, notwithstanding extensive cross-examination of the Government's witnesses by trial counsel. Appellant, in the face of this, presented a defense in which he was merely present in the restaurant selling stolen wigs to the patrons, his common occupation. He claimed the testimony against him was the product of coercion on the part of Mrs. Harper over the employees of her restaurant. On this record, surely trial counsel is not to be faulted for the failure of appellant's cohorts in the stolen wig business to support his story.

Defense counsel, although facing a strong Government case, conducted himself with vigor throughout the entire course of the trial. His cross-examination of the Gov-

ernment witnesses was lengthy and pointed. He made appropriate motions and raised appropriate objections. Plainly appellant has here demonstrated nothing whatsoever to indicate that counsel below by his manner of representation caused appellant to be denied a fair trial.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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